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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In-Flight Phone Corp.
Application for a Preference
to Operate a Live Audio and
Video Programming Service for
Airline Passengers as a Licensee
in the General Wireless
Communications Service

ET Dkt. No. 94-32
PP-88

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In-Flight's application for a pioneer's preference in the licensing of GWCS operators has been opposed by just one party, Claircom. This makes the In-Flight application far less controversial than any of the more than 70 preference applications previously considered by the Commission.^{1/}

Even more importantly, In-Flight's single opponent does not challenge any of the arguments In-Flight made in seeking a preference on the basis of In-Flight's technological innovations which make it possible to provide the service In-Flight would offer as a

1/ More than two years ago -- when it appeared the Commission might consider In-Flight's application as a request for preference in the licensing of narrowband PCS operators -- two narrowband PCS representatives opposed the application. But the arguments they raised against the application are irrelevant to the question of whether In-Flight should be given a GWCS licensing preference. First, Telocator's objection was based entirely on its belief that the service In-Flight developed does not meet the definition of narrowband PCS. Telocator Opp. at 4-6. Pactel Paging likewise objected to grant of a preference to In-Flight as a narrowband PCS license but only because it contended that In-Flight had filed its preference application too late to be considered as an application for preference in narrowband PCS licensing. Pactel Paging Opp. at 4-11.

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GWCS licensee. That service involves the transmission of multiple channels of video and audio programming to airline passengers using land-based transmitters.

Rather than challenge award of a preference based on In-Flight's technological innovation, Claircom instead opposes grant of a preference only if awarded on the basis of In-Flight's unrelated argument that it originated the idea of providing this service. But as we show below, Claircom's effort to raise doubt about whether In-Flight originated this service concept actually helps show that In-Flight did originate the concept.

Claircom's half-baked arguments and the absence of any other opposition to In-Flight's preference application exposes Claircom's anticompetitive motive for lodging its objection. Claircom is one of In-Flight's two competitors in providing communications services to airline passengers. Claircom wants only to complicate In-Flight's ability to offer a communications service to airline passengers that Claircom does not have the expertise to offer. Otherwise, Claircom believes it will be at a competitive disadvantage.

ARGUMENT

In-Flight's application seeks a pioneer's preference in the licensing of GWCS on two separate grounds. First, the application asks for a preference on the ground that the service In-Flight will offer as a GWCS licensee -- providing multiple channels of live programming to airline passengers -- is an innovative service con-

cept and that In-Flight came up with that concept.^{2/} Alternatively, the application requests a preference on the ground that In-Flight developed technical innovations that make it possible to provide this service from terrestrial transmitters in an efficient and cost effective manner.^{3/}

Importantly, not even Claircom has sought to offer evidence that In-Flight's technological innovations are insufficient to justify a pioneer's preference. Although Claircom states that "there is no showing or explanation that In-Flight has brought out the capabilities or possibilities of the ground-to-air broadcast retransmission service . . . to a more advanced state," Claircom does not even attempt to explain the basis for this conclusion.^{4/} Thus, it does not argue that In-Flight failed to develop new technologies. Nor does it offer any evidence that the new technologies In-Flight developed are not sufficiently innovative to warrant a pioneer's preference.

By making a wholly unsupported claim that In-Flight has failed to show that it has improved ground-to-air communications technology, it is obvious that Claircom did not read In-Flight's application. In that application, In-Flight described the technological innovations it developed which make it possible to use terrestrial transmitters for transmitting live programming to aircraft, including technology mitigating the effects of multi-path interference in

^{2/} Preference App. at 4-11.

^{3/} Id. at 11-15.

^{4/} Claircom letter at 3 (July 3, 1995).

ground-to-air transmission and circuitry providing seamless transmission handoff and synchronization as an aircraft passes from one ground station to the next.^{5/} Indeed, In-Flight has spent more than \$7 million to design, construct and flight test a prototype system, and it has demonstrated the techniques it will employ in providing multiple channels of video programming.

While thus effectively admitting that it has no basis to challenge a Commission decision awarding In-Flight a preference based on technological innovation, Claircom instead tries to dissuade the Commission from awarding the preference on the basis of the alternative theory upon which In-Flight seeks a preference -- that In-Flight created the concept of transmitting multiple channels of live programming to airline passengers. Although Claircom does not dispute that this service concept is innovative, it questions whether In-Flight created that concept.^{6/} Claircom has no reason to question this fact. In-Flight created this service and in 1990 began studying the technological, economic, and regulatory issues associated with implementing the concept.

Moreover, the two bits of circumstantial evidence Claircom cites in questioning In-Flight's origination of the service concept actually help show that In-Flight was the originator. Claircom first seeks to leave the impression that the concept may have been developed by Claircom rather than In-Flight by noting that the Commission awarded Claircom an experimental license to develop and

^{5/} Id. at 11-12.

^{6/} Claircom letter at 2.

test a live programming service on August 17, 1992.^{7/} But Claircom did not even apply for its license until nearly two months after the FCC had issued In-Flight a substantially identical license as In-Flight explained in its preference application.^{8/} Moreover, a line-by-line comparison of Claircom's license application with the earlier In-Flight license application and the petition for rule-making which accompanied that application will eliminate any remaining uncertainty: major parts of the subsequently filed Claircom application are nearly identical to the earlier In-Flight filings.

Claircom also tries to leave the impression that Sky Radio may have developed the service concept.^{9/} But this too is preposterous. In fact, In-Flight gave Sky Radio's owners the idea of providing programming to airline passengers as In-Flight documented in its preference application.^{10/} Moreover, while Sky Radio filed an application for experimental license to provide audio programming to airlines via satellite on November 4, 1991, that application was filed three months after In-Flight filed its petition for rulemaking and application for experimental license to provide service via land-based transmitters.^{11/}

^{7/} Id. at 2 n.2.

^{8/} Preference App. at 10.

^{9/} Claircom letter at 2.

^{10/} Preference App. at 9-10.

^{11/} Id. Claircom's request that the FCC deny In-Flight a pioneer's preference on the basis of the content of the programming
(continued...)

CONCLUSION

In-Flight has overcome the technical and economic obstacles that had complicated its ability to offer multiple channels of audio and video programming to airline passengers from ground-based transmitters. In doing so, it has spent more than \$7 million to complete the design, construction, and flight testing of a prototype system to provide the audio programming component of this service. It did this work pursuant to an experimental license awarded by the Commission in 1991. The core technologies will be used to transmit video programming as well. Moreover, In-Flight has demonstrated many of the techniques that will be used to transmit video programming, including the signal compression technology it will use.

Although it has been difficult, In-Flight likewise has made substantial progress in overcoming regulatory obstacles. The single biggest obstacle has been finding spectrum on which it can provide service commercially. In-Flight first identified three megahertz of unused spectrum in the 900 MHz band, and it participated actively in the rulemaking under which that spectrum was allocated to narrowband PCS. Unfortunately, narrowband PCS regulations adopted in mid-1993 do not permit assignment of enough spectrum to

^{11/} (...continued)
it intends to offer is ridiculous. Claircom letter at 3. First, In-Flight has not yet determined the content of most programming it will provide as a GWCS licensee. Even more importantly, the First Amendment would prohibit the Commission from denying a pioneer's preference to an otherwise qualified applicant on the basis of the content of the programming the applicant intends to provide with the license acquired as a result of the pioneer's preference award.

a narrowband PCS licensee to provide the service In-Flight has developed. As the Commission knows, In-Flight next worked for 18 months with NTIA and the National Weather Service ("NWS") to develop a frequency sharing plan that would allow both In-Flight and NWS to share the 1670-75 MHz band. While In-Flight was unable to negotiate a mutually acceptable frequency sharing arrangement, its work led NTIA to order that the government abandon its use of the 1670-75 MHz band later this decade.^{12/} In-Flight next sought to persuade the Commission to allocate the 2390-2400 MHz band to the service In-Flight proposes, but the Commission chose instead to allocate that band to unlicensed PCS. Finally, In-Flight sought adoption of rules to govern GWCS that would accommodate In-Flight's proposed service, and the agency has proposed to do this in its notice of proposed rulemaking governing the licensing of GWCS operations. By law, the Commission must adopt those rules by August 10. If the agency adopts the rules it has proposed, In-Flight's

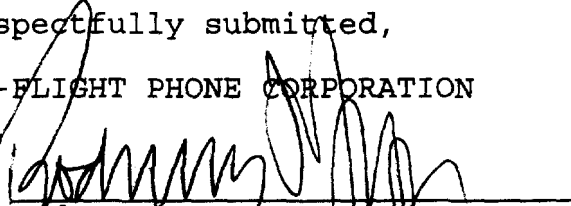
^{12/} The Omnibus Budget Reconciliation Act of 1993 required NTIA to select 100 MHz of spectrum below 3 GHz that is used primarily by government agencies and to establish a 15-year timetable by which those agencies must abandon their use of that spectrum. See 47 U.S.C. §923 (1995 supp.).

final obstacle will be to obtain a GWCS license. Grant of In-Flight's long-pending pioneer's preference application will make it easier for the company to obtain that license.

Respectfully submitted,

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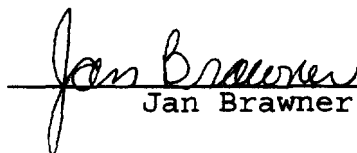
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Reply of In-Flight Phone Corporation to Claircom Opposition" was served July 13, 1995 to the following:

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